ORAL ARGUMENT NOT YET SCHEDULED
No. 12-1100 (and consolidated cases)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WHITE STALLION ENERGY CENTER, LLC, et al.,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

On Petition for Review of Final Agency Action
77 FR 9304 (Feb. 16, 2012)

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GLOSSARY OF TERMS

ACI	Activated Carbon Injection
Act	Clean Air Act
CAA	Clean Air Act
EGUs	Electric Utility Steam Generating Units
EPA	U.S. Environmental Protection Agency
GACT	Generally Available Control Technology
HAP	Hazardous Air Pollutant
HCl	Hydrogen Chloride
Hg	Mercury
ICR	Information Collection Request
JA	Joint Appendix
MACT	Maximum Achievable Control Technology
MATS	Mercury and Air Toxics Standards
OMB	Office of Management and Budget
RfC	Reference Concentration
RfD	Reference Dose
RIA	Regulatory Impact Analysis
TSD	Technical Support Document

UARG	Utility Air Regulatory Group

SUMMARY OF ARGUMENT

Petitioners' challenge to the mercury and air toxics standards ("MATS") rule is grounded in the language of Clean Air Act ("CAA") §112(n)(1)(A) and the U.S. Environmental Protection Agency's ("EPA") contemporaneous interpretations of that provision. As reflected in prior rulemaking, electric utility steam generating units ("EGUs") cannot be regulated under §112 unless the Administrator finds, following §307(d) notice-and-comment rulemaking and considering the results of a study focused exclusively on "hazards to public health," that regulation of EGU hazardous air pollutant ("HAP") emissions is "necessary" and "appropriate." If a HAP emitted by EGUs poses no public health hazard (e.g., acid gases) or if HAP emissions from a large segment of the EGU source category pose no public health hazard (e.g., non-mercury metals), regulation of those emissions cannot be "necessary." For any emissions posing a health hazard, EPA must consider additional factors, including cost, to determine whether and to what degree regulation of that HAP is "appropriate and necessary" to address that hazard.

By contrast, EPA's MATS rule subjects all EGU HAP emissions to §112(d) maximum achievable control technology ("MACT") standards, even though EPA concedes that there are HAP emissions from EGUs that do not create any public health hazard. In fact, EPA concedes that EGU acid gas emissions are being regulated solely because of *environmental* effects, the precise kind of effects that

Congress addressed in the CAA's acid rain title (Title IV).

EPA argues that MACT regulation of EGU emissions posing no health hazard is compelled by §112(c) and (d) and this Court's decisions in *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008), and *National Lime Ass'n v. EPA*, 233 F.3d 625 (D.C. Cir. 2000). And while EPA cites the word "appropriate" to justify regulating emissions not identified as posing any health hazard, EPA finds no room in "appropriate" to consider cost, a factor considered in other §112 risk-based decisions. None of EPA's excuses and explanations for evading §112(n)(1)(A)'s rulemaking criteria withstand scrutiny.

ARGUMENT

I. EPA'S EGU MACT STANDARDS ARE UNLAWFUL UNDER §112(n)(1)(A).

A. Section 112(n)(1)(A) Limits Regulation of EGUs to Those HAP Emissions Posing Public Health Hazards, and Then Only as "Necessary" and "Appropriate."

Congress treated EGUs differently from other sources by making "appropriate and necessary" the guiding principle for *all* regulation of EGU HAP emissions. The plain language of §112(n)(1)(A) provides that to trigger regulation, EPA must identify EGU HAP emissions posing a health hazard, i.e., for which regulation is "necessary." Then, the Administrator shall regulate only to the *extent* she finds is "appropriate" and "necessary."

EPA overstepped its §112(n)(1)(A) authority by promulgating emission standards for *all* EGU HAP emissions, including those posing no health hazard. *See* EPA Br. 56-62. Next, EPA exceeded that authority by setting §112(d) emission standards without evaluating whether, and the degree to which, those standards were "appropriate" for the EGU HAP emissions subject to the standard.

1. EPA's New Approach to EGU HAP Regulation.

Prior to 2011, EPA recognized that an "appropriate and necessary" finding for EGU emissions of one HAP (such as mercury) did not automatically require regulation of all HAPs emitted by EGUs. *See* 65 FR 79825, 79827/3 (Dec. 20, 2000) (EGUs listed for mercury alone, with other HAPs subject to future evaluation)(JA2615); 70 FR 15994, 16002/1-2 (Mar. 29, 2005) (mercury alone warrants consideration)(JA2691).

In 2011, EPA reinterpreted §112(n)(1)(A) to require regulation of *all* EGU HAP emissions upon finding that emissions of *one* HAP poses a health hazard, and *regardless* of whether it is appropriate or necessary to regulate all EGU HAP emissions. *See* 76 FR 24976, 24989/1 (May 3, 2011)(JA14). Moreover, EPA now interprets §112(n)(1)(A) to allow the decision whether it is "necessary" to regulate EGU emissions to be based solely on "environmental" impacts and "public welfare," even though these criteria are absent from §112(n)(1)(A). *See, e.g.,* EPA Br. 45 n.15 ("[E]nvironmental effects may be considered as a primary criterion for

regulating EGUs, *even in the absence of a public health hazard*"), 37 ("[T]he Act plainly authorizes EPA to act to protect public health *and welfare*...") (emphases added). Finally, EPA says it must regulate *all EGU HAP emissions* under §112(d) regardless of any health impact or the cost of regulation. *See, e.g.,* EPA Br. 56.

Based on these interpretations, EPA promulgated emission standards for HAPs that it concedes have *not* been found to present health hazards. These standards were established without evaluating whether that regulation was "appropriate and necessary" considering cost and other factors. As discussed in State, Industry, and Labor Petitioners' Opening Brief ("Opening Br.") and developed further below, these linchpins of EPA's MATS rule cannot be reconciled with §112's language or structure. Rejection of any of these new interpretations requires the rule to be set aside.

2. Example of EPA's Regulatory Overreach: HCl Emissions.

The inconsistency between §112(n)(1)(A) and EPA's flawed interpretations is most evident in the regulation of hydrogen chloride ("HCl") emissions.[1] Nowhere does EPA claim that HCl emissions from EGUs pose *any* public health hazard. Indeed, EPA's brief neglects to mention that HCl was evaluated and found

[1] HCl is the surrogate for all HAP acid gases.

not to present a health hazard in the 1998 Utility Study and thereafter in 2000, 2004 and 2011.[2]

EPA attempts to justify its HCl emission limits in two ways. First, EPA re-defines the trigger for §112 EGU regulation to encompass environmental effects and justifies regulation *on that basis alone*. EPA Br. 14, 48-49. By contrast, in 2005 EPA did not consider the environmental impacts of any HAP emissions, including HCl, as the basis for triggering regulation.[3] This was entirely consistent with the statute because §112(n)(1)(A) directs EPA to address "hazards to public health" in determining whether regulation of an EGU HAP is "appropriate and necessary." It stands to reason that if a HAP like HCl poses no such hazard, regulation cannot be "necessary."

Moreover, regulation of EGU HCl emissions to address purported acidification of ecosystems (*see* EPA Br. 30) conflicts with Congress's 1990 decision to address acidification due to EGU emissions in an entirely new CAA title (Title IV). *See* §401. Under the plain language of §112(n)(1)(A) and

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[2] *See* EPA, Study of HAP Emissions from EGUs—Final Report to Congress, Vol. 1 at 6-3, 6-7 (Feb. 1998), EPA-HQ-OAR-2009-0234-3052 ("Utility Study")(JA550, JA554); 65 FR 79827/3(JA2615); 69 FR 4652, 4656 n.4, 4688 n.10 (Jan. 30, 2004)(JA2642, JA2674); 76 FR 25051/2(JA76).

[3] EPA suggests that it considered environmental impacts in 2005 essentially as it does now. *See* EPA Br. 45-46 n.15. This is misleading. In 2005, EPA stated that environmental factors unrelated to public health could not trigger EGU regulation *in the absence of* health hazards. 70 FR 16002/3(JA2691).

historical reading of that provision, environmental effects cannot justify §112 regulation of an EGU HAP in the first instance; at most, they may be relevant to determining *how much* regulation is "appropriate." EPA argues alternatively that an affirmative "appropriate and necessary" finding for any single HAP (e.g., mercury) *mandates* regulation of all EGU HAP emissions (including HCl) regardless of their health hazard. EPA Br. 48, 56-62. Nothing in §112(n)(1)(A) suggests that result, and EPA cites nothing in §112 to support its new regulatory approach. Nor, as discussed *infra* at pp.12-13 and 16-17, does *National Lime* or *New Jersey* support such a result for EGUs.

3. EPA's New Regulatory Approach Turns §112(n)(1)(A) on Its Head.

EPA admits, as it must, that Congress treated EGUs uniquely under §112. *See* EPA Br. 7. This distinct treatment makes sense because EGUs are subject to other CAA programs that control HAP emissions. EPA's new regulatory approach eliminates this distinct treatment of EGUs, and rejection of it for any of the reasons discussed below requires vacatur of the rule.

a) EPA Unlawfully Failed to Apply the §112(n)(1)(A) Decisional Criteria.

Various §112 provisions call for rulemaking to be conducted using specific decisional criteria. For example, §112(d) establishes control technology criteria for MACT standards. Section 112(f) establishes public health and environmental

criteria for addressing risks that remain after imposition of §112(d) standards. Section 112(m)(6) establishes a "necessary and appropriate" criterion for regulating atmospheric deposition to the Great Lakes and coastal waters to address "serious adverse effects to public health and serious or widespread environmental effects" remaining after regulation under "other provisions of [§112]." Section 112(n)(1)(A) establishes an "appropriate and necessary" criterion for regulating EGU HAP emissions to address "hazards to public health" remaining "after imposition of the requirements of this [Act]." These provisions provide different criteria for regulating *residual* risks from HAP emissions *after* imposition of §112 standards, in the case of (f) and (m), or *after* compliance with other requirements of the CAA, in the case of (n)(1)(A).

Similar to other §112 provisions addressing identified emissions, §112(n)(1)(A) contains decisional criteria for regulating EGU HAP emissions. Unlike §112(m)(6)'s "public health" and "environmental" triggers for regulation of risks that remain after imposition of §112 standards, however, only EGU HAP emissions posing "hazards to public health" that remain after "imposition of the requirements of this [Act]" trigger regulation under §112(n)(1)(A). *Cf. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 473 (2001) ("[r]equisite" means "'sufficient, but not more than necessary'…to protect public health"). And unlike §112(d), "appropriate" and "necessary," *not* "MACT," is the regulatory decisional standard

under §112(n)(1)(A) and (m). Indeed, automatically regulating all EGU HAP emissions under §112(d) MACT standards could theoretically result in regulation that is either higher *or* lower than necessary to address health hazards.

That each of these §112 provisions prescribes different decisional criteria for HAP emissions regulation is confirmed by §307(d)(1)(C), which directs that rules under §§112(d), (f), (m) and (n) be developed using the rulemaking procedures of §307(d)(2)-(6). In these §112 provisions, Congress provided distinct decisional criteria for different sources and different emissions, and in each case required that those criteria be implemented through §307(d) rulemaking. Yet EPA argues that Congress's inclusion of §112(n) in §307(d) was a scrivener's error. *See* EPA Br. 34 n.9. On this basis, EPA claims that §307(d) cannot be read to demonstrate congressional intent that §112(n)(1)(A) provides independent regulatory authority for EGU HAP emissions.

While a court may read a statute contrary to its plain language "[i]f 'the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters,'" this Court has not done so "absent an extraordinarily convincing justification." *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1041 (D.C. Cir. 2001).[4] Nothing about §307(d)(1)(C)'s reference to §112(n) is

[4] In *Appalachian Power*, the error rendered EPA's obligation under the relevant section utterly meaningless. *Id*. That is not the situation here.

demonstrably at odds with congressional intent. As explained, §112(n) is no different from other §112 provisions referenced in §307(d)(1)(C), including §112(m), which uses an "appropriate" and "necessary" decisional criterion to address residual risks.

If EPA had conducted the MATS rulemaking using the §112(n) rulemaking criteria, as opposed to the §112(d) criteria, it would have developed emission standards only as "appropriate and necessary" to address only those EGU HAP emissions that present a health hazard. EPA's failure to apply the §112(n) rulemaking criteria requires that this rule be set aside.

b) EPA Unlawfully Rejected "Public Health Hazards" as the Sole Trigger for EGU Regulation.

In §112(n)(1)(A), Congress recognized that regulation of EGU emissions under other CAA sections could reduce or eliminate health hazards from those emissions, making regulation under §112 unnecessary. Congress therefore directed EPA to address any residual health hazards associated with EGU HAP emissions that remain "after imposition of the requirements of this [Act]." §112(n)(1)(A). Congress did not make "environmental" effects a trigger, as in other §112 provisions. *See, e.g.,* §112(n)(5) & (6) (directing EPA to consider hazards to "public health *and the environment*"), (b)(2) ("adverse human health effects…*or adverse environmental effects*"), (e)(2)(A) ("adverse effects…on

public health *and the environment*"), (m)(6) ("serious adverse effects to public health *and serious or widespread environmental effects*") (emphases added).

According to EPA, §112(n)(1)(A)'s *silence* about environmental impacts authorizes triggering of EGU regulation based solely on environmental effects. *See* 76 FR 24988/2(JA13) (referenced at 77 FR 9304, 9325/1 (Feb. 16, 2012)(JA194)). But congressional silence does not confer discretionary regulatory authority. As this Court has observed:

> To suggest, as the [agency] effectively does, that *Chevron* step two is implicated any time a statute does not expressly *negate* the existence of a claimed administrative power…, is both flatly unfaithful to the principles of administrative law and…refuted by precedent.

Ethyl Corp. v. EPA, 51 F.3d 1053, 1060 (D.C. Cir. 1995). While EPA attempts to distinguish *Ethyl, see* EPA Br. 46 n.16, the Court's analysis there applies with equal force here.

As in *Ethyl*, Congress in §112(n)(1)(A) prescribed what EPA was to consider (public health hazards) and left no room for EPA to consider other unspecified factors to trigger regulation. Moreover, "[a]nother telling indication that the Administrator has misconstrued the meaning of [this] section…is the plain language of…nearby provision[s]," e.g., §§112(n)(5)-(6), (b)(2), (e)(2)(A), and (m)(6), "which explicitly instructs the Administrator to consider [the disputed factor]." *Ethyl*, 51 F.3d at 1061. Omission of a term appearing in other statutory

provisions is a strong indication that Congress meant to exclude it. *See, e.g., Russello v. United States*, 464 U.S. 16, 23 (1983). This is confirmed by §112(n)(1)(A)'s legislative history.[5] EPA's application of the wrong regulatory trigger requires that the rule be set aside.

c) EPA Violated §112(n)(1)(A) by Not Limiting EGU HAP Regulation to Only Those HAP Emissions Found to Pose a Health Hazard.

Under §112(n)(1)(A), the Administrator is to regulate EGU HAP emissions if such regulation is "appropriate and necessary" after considering any "hazards to public health." EPA responds by arguing that the phrase "such regulation" is a cross-reference to §112(d)(1), which this Court has interpreted to require regulation of all HAPs *emitted by a* "*major source*," regardless of risk. *See* EPA Br. 60 n.23. EPA's argument conflicts with the language of §112(n)(1)(A), which requires EPA to find that regulation is "appropriate and necessary after considering the results of the [Utility] study" and evaluating whether "emissions" of HAPs by EGUs pose a residual health risk.

This conclusion is reinforced by other language in §112. For example, §112(n)(1)(A) requires EPA to devise "alternative control strategies for emissions

[5] 136 Cong. Rec. H12934 (daily ed. Oct. 26, 1990) (statement of Rep. Oxley), *reprinted in 1 1990 Legis. Hist.* at 1416(JA2865). Although EPA discounts Senator Oxley's statement (EPA Br. 50 n.19), he was the sponsor of this provision. Moreover, EPA previously relied on the very same statement to support its interpretation of §112(n)(1)(A). *See* 70 FR 16000/2(JA2691); Final EPA Br. at 113 n.42, *New Jersey v. EPA*, No. 05-1097 (D.C. Cir. July 23, 2007)(JA3308).

which may warrant regulation under this section." If EPA were correct that §112 *requires* it to promulgate §112(d) standards for all EGU HAPs regardless of residual public health hazard, then identifying *alternative* control strategies (e.g., targeted regulation not authorized under §112(d)) is a pointless exercise. Only if this requirement informs EPA's analysis of what regulation may be "appropriate" will the provision have meaning.

Similarly, the reference to "emissions which may warrant regulation" assumes that some emissions may *not* warrant regulation, just as identical language in §112(c)(3) requires EPA to identify only those HAP emissions from "area sources" that "warrant" §112(d) regulation. EPA's argument that because the phrase describes the content of the Utility Study it "has no bearing on EPA's obligations" under §112(d) misses the point. *See* EPA Br. 62 n.26. EPA's obligations, and authority, to regulate EGU HAPs are grounded in §112(n)(1)(A), not §112(d), and §112(n)(1)(A) makes the Utility Study EPA's primary focus for deciding *whether* and *how* to regulate EGU HAP emissions.

National Lime does not support EPA's arguments that §112(n)(1)(A) requires regulation of all EGU HAP emissions or none. *National Lime* addressed language in §112(d)(1), which required "promulgat[ion] [of] regulations establishing emission standards for [sources]…of hazardous air pollutants," and

concluded this language required MACT standards for all HAPs emitted by a "major source" in a source category listed under §112(c). 233 F.3d at 633.

By contrast, EGUs are regulated under §112(n)(1)(A) to the extent "appropriate and necessary" to address residual health hazards identified in the Utility Study. This EGU-specific provision does *not* cross-reference §112(d)(1) or repeat the §112(d)(1) language on which *National Lime* relies. Given the absence of a "clear statutory obligation to set emission standards for each listed HAP," *id.* at 634, and the clear statutory language limiting regulation of EGU HAPs as "appropriate and necessary," EPA cannot rely on *National Lime* to regulate *all* EGU HAP emissions after making an "appropriate and necessary" determination for one HAP emitted by EGUs.

This analysis finds support in a recent decision addressing §112(c)(6), a provision "designed for seven HAPs that Congress thought deserved special attention." *Desert Citizens Against Pollution v. EPA*, 699 F.3d 524, 528 (D.C. Cir. 2012). This Court affirmed EPA's conclusion that it was unreasonable to read §112(c)(6) to regulate "a broad array of HAPs…at a §112(c)(6) source" simply because §112(c)(6) cross-references §112(d)(2). *Id.* Unlike §112(c)(6), §112(n)(1)(A) contains no cross-reference that could create ambiguity. Instead, Congress explicitly directed EPA to regulate EGU HAP emissions *only* as "appropriate and necessary."

Finally, the plain language of §307(d)(1)(C) shows that §112(d) and §112(n) proceedings are separate, not overlapping, undertakings. *See* §307(d)(1)(C) (listing rulemakings to which §307(d) procedures apply, and listing §112(d) and §112(n) separately). If all §112(n) rulemaking proceedings require establishment of §112(d) standards, there is no reason to list them separately in §307(d).

d) EPA Erred by Not Considering Costs in Determining the "Appropriate" Degree of Regulation.

According to EPA, once it determines that regulation of any EGU HAP emission is "necessary" to address a health hazard, regulation of all EGU HAP emissions must be "appropriate" regardless of cost. EPA Br. 50-55. EPA argues that its decision to disregard cost completely is a permissible interpretation of §112(n)(1)(A). *See id*. EPA's current interpretation is contrary to §112(n)(1)(A)'s terms and patently unreasonable.

As to the statute, EPA's view that it must regulate *all* EGU HAP emissions even if they pose no health hazard means that regulation can impose huge costs with no benefit. This is precisely the case here, according to EPA's own analysis. Opening Br. 39-44. If the statutory term "appropriate" imposes any limit on EPA regulation, it must at least limit regulation to "risks [that] are worth the cost of elimination." *See Michigan v. EPA*, 213 F.3d 663, 677 (D.C. Cir. 2000) (addressing the term "significant"). This is consistent with the common sense

usage of the term "appropriate" to embody a host of considerations, including cost and environmental impacts.[6] *See* Opening Br. 39.

Consistent with this common sense reading of "appropriate," EPA in 2005 recognized cost as a relevant factor. *See* 70 FR 16000/3-01/1(JA2689-90). EPA now offers three explanations for abandoning this reading. First, EPA argues that *Michigan* allows, but does not compel, cost considerations in standard-setting. EPA Br. 51 n.20. *Michigan*, however, makes clear that cost is an essential factor in regulatory decision-making where the statute contains terms that indicate a balancing of competing considerations. *Cf. Michigan,* 213 F.3d at 677-78 ("'[C]an an agency sensibly decide whether a risk is "significant" without also examining the cost of eliminating it?'"). As in *Michigan* with respect to the term "significant," EPA here "fail[s] to describe the intellectual process by which [it] would determine…[appropriateness] if it may consider only health." *Id.* at 678. Far from supporting EPA's §112 interpretation, *Michigan* demonstrates that EPA unreasonably excluded any cost consideration.

Second, EPA argues §112(c), (c)(9), and (d)(2) all prohibit considering cost. *See* EPA Br. 53. But nothing in §112(n)(1)(A) required EPA to regulate EGU

[6] EPA mistakenly argues there is an inconsistency in Petitioners' treatment of "environmental impacts" and "cost." *See* EPA Br. 47-48. Petitioners have been entirely consistent: cost and environmental impacts are relevant factors in determining the "appropriate" level of regulation, but not in triggering potential regulation, which must be based on health hazards alone.

HAP emissions under §112(c) and (d) in the first place. Section 112(n)(1)(A) constrains EPA's authority to promulgate only "appropriate and necessary" regulation of EGU HAP emissions, and nothing in §112(c) or (d) vitiates the "appropriate" criterion expressly mandated by §112(n)(1)(A).

Finally, EPA argues that it may reasonably regulate EGU HAP emissions regardless of cost to address "hazards…that would otherwise go unaddressed." EPA Br. 54. But nowhere in the MATS rule does EPA identify harmful HAP emissions that will "go unaddressed" if EPA considers the cost of addressing the harm. While it may be a matter of discretion how much weight to give cost compared to other factors for a particular EGU HAP emission, cost cannot be completely ignored.

4. *New Jersey* Does Not Bar or Resolve Any of Petitioners' §112(n)(1)(A) Objections or Challenges to the Lawfulness of EPA's §112(d) Regulation.

In *New Jersey*, the parties addressed at length §112(n)(1)(A)'s restrictions on EPA's authority to regulate EGU HAP emissions. The Court did not resolve any of those arguments but instead limited its opinion (and oral argument) to addressing EPA's authority to remove EGUs from the §112(c) list of "major" sources without first making the findings required for delisting under §112(c)(9).[7]

[7] According to the Court, this provision also precluded EPA from removing a major source category from the §112(c)(1) list even upon finding that the listed

Thus, *New Jersey* only resolved EPA's delisting obligations. It did not evaluate the lawfulness of EPA's December 2000 §112(n)(1)(A) finding.

Perhaps the best illustration of this limited opinion is found in the Court's refusal to consider an argument (based on *Thomas v. New York*, 802 F.2d 1443, 1446-47 (D.C. Cir. 1986)) that EPA's December 2000 finding could have no binding legal effect under §112 and, therefore, that listing of EGUs could not trigger any regulation of EGU HAP emissions.[8] Because the Court refused to resolve issues related to the Administrator's authority and responsibilities under §112(n)(1)(A) and the lawfulness of EPA's regulation of EGUs under §112(d), these issues are ripe for review. *See, e.g., Nat'l Asphalt Pavement Ass'n v. Train*, 539 F.2d 775, 779 n.1 (D.C. Cir. 1976) (listing decisions under §111 are reviewed when EPA promulgates final standards).

B. EPA's "Appropriate and Necessary" Determination Lacks Record Basis.

1. The Record Does Not Establish That Residual EGU Mercury Emissions Create a Health Hazard.

When EPA issued the December 2000 "notice of regulatory finding" on mercury emissions, it admitted that it could not quantify the amount of methylmercury in fish attributable to EGU emissions, 65 FR 79827/2-3(JA2615).

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category was not major, a fact that would preclude listing in the first place. *New Jersey*, 517 F.3d at 582.

[8] *Id.* at 581 n.3; Opening Br. 27-28.

It logically follows that EPA did not know if its action would result in any change in methylmercury levels in fish. Both findings were necessary to determine whether EGU mercury emissions posed an actual health hazard.

Between December 2000 and 2005, EPA completed extensive data collection and modeling designed to quantify the impact of EGU mercury emissions, and on those bases, concluded that those emissions presented no health hazard in light of other CAA requirements. 70 FR 16015/2-16022/3(JA2704-11). As EPA concedes, coal-fired EGU mercury emissions have declined even more quickly as a result of other CAA regulations than EPA anticipated in 2005.[9]

Nevertheless, EPA now says that mercury emissions from coal-fired EGUs pose a health hazard because it projects that methylmercury exposures for the most sensitive individuals would exceed the reference dose ("RfD") for 29% of the waterbodies EPA has modeled. But, exceedance of an RfD does not establish a health hazard. Rather, as EPA has explained, a margin of safety (10-fold in the case of methylmercury) is built into the RfD, such that "[d]oses higher than the RfD may carry some risk, but because of the margin of safety, a dose above the RfD does not mean that an effect will necessarily occur." EPA, Toxicity Assessment, www.epa.gov/region8/r8risk/hh_toxicity.html(JA3344).

[9] In the proposed MATS rule, EPA estimated that mercury emissions from coal- and oil-fired EGUs totaled 29 tons, lower than the 38 tons EPA estimated in 2005. *Compare* 70 FR 16018 Table VI-3(JA2707) *with* 76 FR 25002/2(JA27).

To find a health hazard, EPA must address the significance of the risk that those exposures are projected to create. *See, e.g., NRDC v. EPA*, 824 F.2d 1146, 1153 (D.C. Cir. 1987) ("[S]omething is 'unsafe' only when it threatens humans with a 'significant risk of harm.'"). The record in this case shows that the RfD exceedances modeled by EPA involve only an insignificant, theoretical effect from mercury exposures (i.e., a hypothetical reduction of two one-thousandths of an IQ point for the most exposed, sensitive individuals).[10] EPA's RIA analysis thus supports its 2005 finding: there is no public health risk associated with current EGU mercury emissions. That those emissions continue to decline through imposition of other CAA requirements further undermines EPA's health hazard finding.

2. Non-Mercury Metals Do Not Pose a Health Hazard.

EPA's conclusion that EGU emissions of non-mercury metals create a health hazard rests on its "16-Plant Study."[11] That study's single goal was to identify

[10] EPA accuses Petitioners of conflating the Mercury Technical Support Document ("TSD") and EPA's Regulatory Impact Analysis ("RIA"). EPA Br. 39. Petitioners only cite what EPA itself has said. The Mercury TSD does not quantify the public health significance of the projected mercury levels in waterbodies. The RIA attempts to answer that question and finds essentially no IQ benefits. *See* EPA, RIA for Final MATS at 4-56 (Dec. 2011), EPA-HQ-OAR-2009-0234-20131(JA2356).

[11] EPA, Non-Hg Case Study Memo (Mar. 16, 2011), EPA-HQ-OAR-2009-0234-2939 ("16-Plant Study")(JA444) and EPA, Supplement to the Non-Hg Case Study Chronic Inhalation Risk Assessment (Nov. 2011), EPA-HQ-OAR-2009-0234-19912(JA1889). The study involved 15 coal-fired and one oil-fired EGUs.

those EGUs that might present off-site risks greater than one-in-one million,[12] and concluded that only four coal-fired plants presented risks slightly greater than one-in-one million. EPA made no effort to explain why regulation of EGUs posing less than one-in-one million risk (virtually all of the industry) would be "warranted" to address a "public health" hazard, or why EPA's use of one-in-one million is the correct threshold in light of past EPA actions examining health risks, including EPA's §112(f) residual risk rulemaking.[13] Nevertheless, under EPA's §112(n)(1)(A) interpretation, only plants posing risks greater than one-in-one million were relevant to EPA's §112(n)(1)(A) responsibilities.

As to the four plants with greater than one-in-one million risk, commenters explained that these risks were driven by unrealistic chromium contributions. Chromium risks calculated by EPA were an order of magnitude or more higher than risks calculated in all HAP risk assessments conducted in the past 15 years. Furthermore, EPA's chromium emission assumptions suggested that these plants, in several cases, were emitting more chromium after control than before. *See* Utility Air Regulatory Group ("UARG") Comments 76 n.134 (Aug. 4, 2011),

[12] 16-Plant Study at 1 and 2 (EPA focused on "highest risk facilities based upon previous studies" and EGUs "with the highest emission rates of chromium and arsenic" from the information collection request ("ICR") testing)(JA444-45).

[13] *NRDC v. EPA*, 529 F.3d 1077, 1080 (D.C. Cir. 2008) (discussing the "100-in-one million" level for §112 residual risk regulation that EPA regarded as "the 'presumptively acceptable' level under its precedents").

EPA-HQ-OAR-2009-0234-17775(JA1478). Commenters therefore reasoned that EPA's assumptions must have been driven by contaminated stack samples for these four plants.

EPA never meaningfully engaged these comments. Rather than addressing why sampling values for the four plants were far out of line with all other plants tested and with all past assessments, EPA's only response was to characterize the contamination comment as "speculat[ive]" and to suggest that the certifications filed by those conducting the testing justified EPA's unquestioning use of the values.[14] In sum, EPA wholly failed to respond to these comments about its projected risks. *See Nat'l Lime Ass'n v. EPA*, 627 F.2d 416, 443 & n.90 (D.C. Cir. 1980) (enforcing EPA duty to respond to significant comments); *Madison Gas & Elec. Co. v. EPA*, 25 F.3d 526, 527-28 (7th Cir. 1994) (determining EPA's cursory response to commenter concerns was wholly inadequate). This failure to respond to comments is not a minor detail; it is EPA's entire basis for nudging the predicted health risk for four plants above the one-in-one million level, thereby subjecting *all* EGU HAP emissions to MACT standards.

Following promulgation of the MATS rule, UARG undertook retesting of the four plants. UARG submitted these new tests, which followed the same testing

[14] EPA Br. 43-44. Utilities had to certify that test results were accurately reported. This does not mean that the test results were unaffected by contamination.

protocol as the prior ICR certification, in a §307(d) petition for reconsideration. The re-tests conclusively establish that EPA's modeled risks were greatly overstated due to sample contamination. UARG's modeling showed that realistic chromium values produce risk estimates for these four plants well below one-in-one million. UARG Reconsideration Petition 5-7 (Apr. 16, 2012), EPA-HQ-OAR-2009-0234-20179(JA2492-94). UARG's reconsideration petition has been pending before EPA for almost a year—two-and-a-half times longer than EPA took to review all rulemaking comments and promulgate the final MATS rule. If this Court believes that EPA's response to UARG's petition is necessary for the Court to resolve this challenge, the Court should remand the record and order EPA to act expeditiously on the petition. *Cf. Sierra Club v. Gorsuch*, 715 F.2d 653, 660-61 (D.C. Cir. 1983).

3. HCI Emissions Do Not Pose a Health or Environmental Hazard.

As Petitioners explained in their opening brief, HAP acid gas emissions do not pose a health hazard. EPA does not contest this fact. Instead, EPA finds it "appropriate and necessary" to regulate acid gas HAP emissions from EGUs because those emissions pose environmental risks. EPA Br. 48. As discussed above, this is not an adequate basis for triggering §112(n) regulation and, in any event, lacks record support.

In response, EPA summarily claims that "[p]ublished scientific research demonstrates that EGU acid gas emissions can exacerbate acidification effects already experienced in many sensitive ecosystems across the country." *Id*. The "published research" referred to by EPA, however, is a single study, *see* 76 FR 25013/2(JA38), on the effects of HCl deposition on waterbodies contained in United Kingdom peatlands. As commenters explained, that study's conclusions do not apply to EGU emissions in the U.S. because: (i) U.S. coals have substantially lower chlorine contents than U.K. coals, (ii) U.S. soils have different compositions than U.K. peatland soils, and (iii) chloride mobility observed in this single U.K. study cannot be generalized to all ecosystems. *See* EPRI Comments 3-47 (Aug. 4, 2011), EPA-HQ-OAR-2009-0234-17621(JA743). In addition, EPA never identifies the "sensitive ecosystems" it claims might be affected in the U.S., and fails to explain how acidification of any U.S. ecosystem can be severely affected by EGU HCl emissions that comprise only 0.7% of emissions with acidifying potential. *See id.* Nor does EPA ever address how this single U.K. study could have any bearing on the critical issue of whether the *amount* of acid gases emitted by any individual EGU poses any environmental risks.

II. ASSUMING EPA WAS COMPELLED TO ESTABLISH EGU STANDARDS UNDER §112(d), THE MATS RULE MUST BE VACATED BECAUSE EPA FAILED TO DISTINGUISH BETWEEN MAJOR AND AREA SOURCES.

Section 112(a) defines a "major source" as one that emits HAPs above a specific tonnage threshold, and an "area source" as one that is "not a major source." Section 112(c)(1) then requires the Administrator to list "all categories and subcategories of major sources and area sources." Area sources are to be "listed under" §112(c)(3), which provides criteria (in addition to the tonnage threshold) that the Administrator "shall" use for listing. Having listed categories of major sources and categories of area sources, EPA is required under §112(d) to "promulgate regulations establishing emission standards for each category or subcategory of major sources and area sources."

While EPA must establish MACT standards for listed major sources, area sources can be regulated in one of two ways under §112(d): either MACT standards or an "alternative standard[]" that reflects use of "generally available control technologies [("GACT")]." §112(d)(5). And while major sources are subject to MACT standards for each HAP emitted, *National Lime*, 233 F.3d at 633-34, area sources are subject to either MACT or GACT standards *only* for those HAPs that EPA finds "present[] a threat…warranting regulation." §112(c)(3). Under the plain language of §112, therefore, if EPA elects to establish MACT standards for both major sources and area sources, it must develop separate

standards for each based on (i) the different population of sources in the different source categories, and (ii) the different pollutants regulated under each category.

EPA admits that it ignored the distinction between major and area sources both in listing EGUs under §112(c) and in establishing §112(d) standards. EPA argues, nevertheless, that under the first step of *Chevron*, "once EGUs were listed pursuant to EPA's [December 2000] section [112(n)(1)(A)] determination, EPA was required to promulgate standards *consistent with the requirements of* [*§112(d)*]…." EPA Br. 57-58 (emphasis added). EPA's standards, however, were not consistent with §112(d).

Up to 42 percent of units that EPA used to establish the EGU MACT standard for each HAP were potential area source units; the remainder were major source units.[15] By defining performance using the composite of "best performing" sources taken from both major and area EGUs, EPA's MACT standards were established in a manner never authorized by Congress, resulting in more stringent standards for major sources than Congress ever contemplated. *See NRDC v. EPA*, 489 F.3d 1250 (D.C. Cir. 2007) (vacating MACT standards set using the wrong universe of sources).

[15] EPRI's comments identified potential area sources. EPRI Comments, Appendix C(JA745-46). Petitioners constructed a table (JA2450-52) by comparing EPRI's list of area sources to the MACT floor data used by EPA for each HAP group, MACT Floor Analysis, Attachment a4, tab *fPM_avg_MMBtu,* Attachment a3, tab *HCl_Avg_MMBtu*, and Attachment a2, tab *Hg_Avg_>8300_Btulb_MMBtu* (Dec. 16, 2011), EPA-HQ-OAR-2009-0234-20132.

Alternatively, EPA argues that if its *Chevron* Step I argument is not accepted, *Chevron* Step II saves the rule. But if the statutory language saps EPA of *any* discretion to choose a different regulatory approach, as EPA argues here, *see* EPA Br. 65, EPA's rule cannot possibly reflect a "reasonable" exercise of the very discretion EPA says it lacks. Either §112(n)(1)(A) directs EPA to regulate only those EGU HAP emissions that pose "public health" hazards under an "appropriate and necessary" rulemaking standard (as Petitioners argue), or §112(c) and (d) establish a plain meaning path for regulation of EGU emissions that EPA has not followed. Under either interpretation, EPA's MATS standards must be set aside.

Recognizing its *Chevron* Step I argument vanishes under the statutory language governing listing area sources under §112(c)(3) and regulating them under §112(d), EPA suggests these provisions do not apply to EGUs. According to EPA, because §112(n)(1)(A) authorizes EPA to regulate EGUs (as defined in §112(a)(8)) *regardless* of whether they are major or area sources, §112(c)(3) is "superfluous" for EGUs. EPA Br. 64. EPA is wrong.

EGUs are defined in §112(a) to determine the applicability of §112(n)(1)(A), just as "major" and "area" sources are defined in §112(a) to determine the applicability of §112(c) and (d). Each defined term ("EGU," "major source," and "area source") can be given effect without reading any statutory provision out of the CAA as "superfluous." Because, according to EPA, §112(n)(1)(A) imposes no

obligation on EPA to identify EGU HAP emissions that *do not* "*warrant*" regulation, *see supra* pp.11-13, §112(c)(3) becomes the only provision in §112 requiring EPA to identify HAP emissions that *do not* "warrant[] regulation." As a result, §112(c)(3) is not "superfluous," if §112(c) and (d) govern EGU standard-setting as EPA argues. Section 112(c)(3) determines which HAPs will be subject to area source regulation; section 112(d)(2), as construed in *National Lime*, 233 F.3d 625, determines which HAPs are subject to major source MACT.[16]

EPA next argues that it could reject GACT standards for EGU area sources because they have "'similar…emissions and [similar] control technologies'" to major sources. EPA Br. 66 (quoting 77 FR 9438/2). This proves too much. Any listed "area" source category has emissions similar to those of the comparable "major" source category. Emissions are just lower. Acceptance of EPA's rationale would require rejection of GACT in every area source rulemaking, rendering the provision meaningless.

Finally, even if EPA is correct that area sources with higher mercury emissions should be regulated under MACT rather than GACT, EPA Br. 66, EPA has cited no other EGU HAP emission "warranting" such regulation under §112(c)(3). Thus, even accepting EPA's view that §112(n) does not provide the

[16] On the other hand, if Petitioners' construction of §112(n)(1)(A) is correct, §112(c)(3) is simply irrelevant, because §112(n)(1)(A) provides the sole decisional criteria for regulating EGUs.

decisional criteria for regulating EGU HAPs, EGU area source regulation could have been no broader than mercury emissions.

III. ASSUMING §112(c) AND (d) GOVERN REGULATION OF EGU HAP EMISSIONS, EPA'S MACT STANDARDS ARE UNLAWFUL.

A. EPA's Mercury MACT Limits Are Arbitrary and Capricious.

In setting a MACT floor under §112(d)(3), EPA must determine the best performing 12% of existing units in a category. To determine the EGU MACT floor for HCl, non-mercury metals, and mercury, EPA identified, out of the approximately 1100 units in the industry, approximately 170 low-emitting, well-controlled coal-fired EGUs for each pollutant for ICR testing (i.e., about 15% of the industry).[17] For the HCl and non-mercury metals MACT floors, EPA identified, from the ICR testing, the best performing 12% of all units (i.e., 131 of 170). For mercury, however, EPA abandoned this approach after ICR testing.

The mercury MACT floor was based on a population of units comprising (1) the ICR tested units, and (2) other units with historic data. From this population of under 400 units (approximately a third of all units), EPA selected the 12% "best performers" (i.e., 40 units). Because the sub-population EPA used to establish the floor included the 15% of all units believed to be best performers (e.g., the 170 ICR tested units), the MACT floor was based on best performing

[17] EPA, Response to Comments on Proposed ICR 27 (Nov. 5, 2009), EPA-HQ-OAR-2009-0234-0063(JA397).

units representing less than 4% of all units, or stated differently, the floor was based on the "best" (i.e., top third) of the 12% "best performers" in the category.

In the preamble to the proposal, EPA's sole justification for treating the ICR mercury data differently from ICR data on other HAP emissions was to deny that the units selected for ICR testing were the best performing sources for mercury. Commenters responded that EPA's denial was contradicted by EPA's statements to the Office of Management and Budget ("OMB") justifying the mercury ICR. UARG Comments 88(JA1485). Moreover, evidence that the ICR tested units were the best performing ones showed: (1) a disproportionately high percentage of ICR tested units had effective mercury control equipment,[18] (2) the average mercury emissions of the tested units were 39% lower than that of the historic data, and (3) virtually all units used to calculate the MACT floor pool were ICR tested units. *See* UARG Comments 90-92(JA1487-89).

In the final rule, EPA did not dispute that, if the ICR tested units were the lowest-emitting units in the category, it could not justify the MACT floor selected. EPA continued to insist, however, that best performing units were not

[18] In its brief, EPA maintains that the fact that 73% of plants equipped with activated carbon injection ("ACI") were required to conduct ICR testing is not indicative of EPA's targeting the best performers for testing. EPA Br. 73 n.36. But basic statistics contradicts EPA's claim. Choosing 73% of all units equipped with ACI for ICR testing when those units comprise only 15% of all units is not a fortuitous happenstance. It was a deliberate choice.

disproportionally sampled. In doing so, EPA simply repeated its denial of any bias in selection, characterized its earlier representations to OMB as in error, and ignored comments that confirmed the low emissions bias in ICR unit selection. In other words, all EPA had to say in promulgating the final mercury MATS was: "That's my story and I'm sticking to it."[19] This hardly satisfies reasoned decision making.

B. EPA's Decision Not to Set §112(d)(4) Standards Is Arbitrary and Capricious.

Section 112(d)(4) authorizes EPA to set alternative standards if those standards will protect health "with an ample margin of safety." In the final rule, EPA declined to issue health-based limits for HCl because of "information gaps." EPA Br. 88.

During the rulemaking, however, commenters pointed EPA to extensive health-based analyses and data, including EPA's 1998 Utility Study and its 16-Plant Study. UARG Comments 116-17(JA1494-95); Southern Company Comments 143 (Aug. 4, 2011), EPA-HQ-OAR-2009-0234-18023(JA1685). In addition, commenters provided an EPRI study,[20] which modeled *every* U.S. coal-fired EGU, that confirmed public exposures to HCl emissions from EGUs were all

[19] Collin Raye, "That's My Story."

[20] EPRI, Updated HAPs Emissions Estimates and Inhalation Human Health Risk Assessment for U.S. Coal-Fired EGUs (2011 revision), EPA-HQ-OAR-2009-0234-16738(JA659).

below the reference concentration ("RfC") level that EPA defines as being without appreciable risk of deleterious effects over a lifetime. UARG Comments 117-18(JA1495-96).

EPA now asserts that if there is any "fault" in EPA's refusal to consider §112(d)(4) standards in the final rule, the "fault lies not with EPA." EPA Br. 89. But this excuse is rebutted on its face by the commenters' submissions that provided the necessary information and a methodology for developing §112(d)(4) standards. EPA's refusal to consider health-based standards in the face of uncontested information that EGU acid gas HAP emissions were *well* below EPA's own health-protective threshold, *see, e.g.,* Opening Br. 53, 62, is arbitrary and capricious.

C. EPA's Denial of UARG's Delisting Petition Lacks Basis.

In response to UARG's delisting petition, EPA cites *NRDC v. EPA,* 489 F.3d at 1373, for the proposition that §112(c)(9) only permits delisting of source categories, not subcategories. EPA Br. 63. In its December 2000 notice of finding, however, EPA found that regulation of gas-fired EGUs under §112 was neither "appropriate" nor "necessary." 65 FR 79826/1(JA2614). Nothing prevents EPA from likewise deciding that coal-fired EGUs should not be regulated under §112.

EPA is also wrong in asserting that UARG failed to demonstrate that coal-fired EGUs meet the §112(c)(9) delisting criteria. *See* EPA Br. 62-63. UARG's delisting petition included inhalation pathway modeling that addressed HAP emissions from every U.S. coal-fired EGU. That modeling showed that no plant exceeded a risk of one-in-one million. EPA's attempt to dismiss that portion of UARG's delisting petition with the 16-Plant Study is fatally flawed, for the reasons discussed above. *See supra* p.19-22. EPA also attempts to dismiss UARG's petition by citing a single result in UARG's extensive multi-pathway modeling as having a risk greater than one-in-one million, and also claiming that UARG failed to model the worst-case scenario. *See* 77 FR 9365/1(JA234). In fact, UARG's petition identified numerous, compounding conservatisms in the multi-pathway modeling, which EPRI explained would likely lead to over-prediction of risk.[21] As a result, EPRI's multi-pathway modeling approach was appropriate and followed EPA's guidelines, and satisfied §112(c)(9).[22] At a minimum, EPA cannot simply dismiss this highly conservative multi-pathway modeling analysis without addressing EPRI's conclusion that the conservatisms in its analysis meant there

[21] UARG, De-Listing Petition at 12 (Aug. 4, 2011), EPA-HQ-OAR-2009-0234-17777(JA1532).

[22] In footnote 27 of its brief, EPA asserts that its guidance memorandum on delisting petitions is not a regulation and does not have legal force. But the footnote fails to explain that EPA staff gave this memorandum to UARG and instructed UARG to follow it.

was no possibility of *any* individual exposure pathway having risk greater than one-in-one million. For these reasons, UARG's delisting petition should be remanded for further consideration.

CONCLUSION

For the foregoing reasons, the Court should vacate the MATS rule.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Circuit Rules 32(a)(1) and 32(a)(2)(C), I hereby certify that the foregoing Joint Reply Brief of State, Industry, and Labor Petitioners in final form contains 7,224 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and therefore is within the word limit set by the Court.

Dated: April 8, 2013 /s/ F. William Brownell

CERTIFICATE OF SERVICE

I hereby certify that, on this 8th day of April 2013, a copy of the Joint Reply Brief of State, Industry, and Labor Petitioners in final form was served electronically through the Court's CM/ECF system on all ECF-registered counsel.

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